

Section 6-4-12 Definitions

As used in Sections 6-4-12 and 6-4-13 NMSA 1978:

A. "adjusted for inflation" means increased in accordance with the formula for inflation adjustment set forth in Exhibit C to the master settlement agreement;

B. "affiliate" means a person who directly or indirectly owns or controls, is owned or controlled by, or is under common ownership or control with, another person. Solely for purposes of this definition, the terms "owns", "is owned" and "ownership" mean ownership of an equity interest, or the equivalent thereof, of ten percent or more, and the term "person" means an individual, partnership, committee, association, corporation or any other organization or group of persons;

C. "allocable share" means Allocable Share as that term is defined in the master settlement agreement;

D. "cigarette" means any product that contains nicotine, is intended to be burned or heated under ordinary conditions of use, and consists of or contains:

(1) any roll of tobacco wrapped in paper or in any substance not containing tobacco;

(2) tobacco, in any form, that is functional in the product, which, because of its appearance, the type of tobacco used in the filler, or its packaging and labeling, is likely to be offered to, or purchased by, consumers as a cigarette; or

(3) any roll of tobacco wrapped in any substance containing tobacco which, because of its appearance, the type of tobacco used in the filler, or its packaging and labeling, is likely to be offered to, or purchased by, consumers as a cigarette described in Paragraph (1) of this subsection. The term "cigarette" includes "roll-your-own" (i.e., any tobacco which, because of its appearance, type, packaging, or labeling is suitable for use and likely to be offered to, or purchased by, consumers as tobacco for making cigarettes). For purposes of this definition of "cigarette", 0.09 ounces of "roll-your-own" tobacco shall constitute one individual "cigarette";

E. "master settlement agreement" means the settlement agreement (and related documents) entered into on November 23, 1998 by the state and leading United States tobacco product manufacturers;

F. "qualified escrow fund" means an escrow arrangement with a federally or state chartered financial institution having no affiliation with any tobacco product manufacturer and having assets of at least one billion dollars (\$1,000,000,000) where such arrangement requires that such financial institution hold the escrowed funds' principal for the benefit of releasing parties and prohibits the tobacco product manufacturer placing the funds into escrow from using, accessing or directing the use of the funds' principal except as consistent with Subsection B of Section 6-4-13 NMSA 1978;

G. "released claims" means Released Claims as that term is defined in the master settlement agreement;

H. "releasing parties" means Releasing Parties as that term is defined in the master settlement agreement;

I. "tobacco product manufacturer" means an entity that after the date of enactment of this act directly (and not exclusively through any affiliate):

(1) manufactures cigarettes anywhere that such manufacturer intends to be sold in the United States, including cigarettes intended to be sold in the United States through an importer (except where such importer is an original participating manufacturer (as that term is defined in the master settlement

agreement) that will be responsible for the payments under the master settlement agreement with respect to such cigarettes as a result of the provisions of subsection II(mm) of the master settlement agreement and that pays the taxes specified in subsection II(z) of the master settlement agreement, and provided that the manufacturer of such cigarettes does not market or advertise such cigarettes in the United States);

(2) is the first purchaser anywhere for resale in the United States of cigarettes manufactured anywhere that the manufacturer does not intend to be sold in the United States; or

(3) becomes a successor of an entity described in Paragraph (1) or (2) of this subsection.

The term "tobacco product manufacturer" shall not include an affiliate of a tobacco product manufacturer unless such affiliate itself falls within Paragraph (1), (2) or (3) of this subsection; and

J. "units sold" means the number of individual cigarettes sold in the state by the applicable tobacco product manufacturer (whether directly or through a distributor, retailer or similar intermediary or intermediaries) during the year in question, as measured by excise taxes collected, ounces of "roll-your-own" tobacco sold and sales of products bearing tax-exempt stamps on packs or "roll-your-own" tobacco containers. The secretary of taxation and revenue shall promulgate such rules as are necessary to ascertain the amount of state excise tax paid on the cigarettes of such tobacco product manufacturer for each year.

History: Laws 1999, ch. 208, § 1; 2009, ch. 197, § 1.

Section 6-4-13 Requirements. [Contingent repeal.]

A. Any tobacco product manufacturer selling cigarettes to consumers within the state (whether directly or through a distributor, retailer or similar intermediary or intermediaries) after the date of enactment of this act shall do one of the following:

(1) become a participating manufacturer (as that term is defined in section II(jj) of the master settlement agreement) and generally perform its financial obligations under the master settlement agreement; or

(2) place into a qualified escrow fund by April 15 of the year following the year in question the following amounts (as such amounts are adjusted for inflation):

(a) 1999: \$.0094241 per unit sold after the date of enactment of this act;

(b) 2000: \$.0104712 per unit sold;

(c) for each of 2001 and 2002: \$.0136125 per unit sold;

(d) for each of 2003 through 2006: \$.0167539 per unit sold; and

(e) for each of 2007 and each year thereafter: \$.0188482 per unit sold.

B. A tobacco product manufacturer that places funds into escrow pursuant to Paragraph (2) of Subsection A of this section shall receive the interest or other appreciation on such funds as earned. Such funds themselves shall be released from escrow only under the following circumstances:

(1) to pay a judgment or settlement on any released claim brought against such tobacco product manufacturer by the state or any releasing party located or residing in the state. Funds shall be released from escrow under this paragraph:

(a) in the order in which they were placed into escrow; and

(b) only to the extent and at the time necessary to make payments required under such judgment or settlement;

(2) to the extent that a tobacco product manufacturer establishes that the amount it was required to place into escrow on account of units sold in the state in a particular year was greater than the master settlement agreement payments, as determined pursuant to section IX(i) of that agreement, including after final determination of all adjustments, that such manufacturer would have been required to make an account of such units sold had it been a participating manufacturer, the excess shall be released from escrow and revert back to such tobacco product manufacturer; or

(3) to the extent not released from escrow under Paragraphs (1) or (2) of this subsection, funds shall be released from escrow and revert back to such tobacco product manufacturer twenty-five years after the date on which they were placed into escrow.

C. Each tobacco product manufacturer that elects to place funds into escrow pursuant to Paragraph (2) of Subsection A of this section shall annually certify to the attorney general that it is in compliance with Paragraph (2) of Subsection A of this section and Subsection B of this section. The attorney general may bring a civil action on behalf of the state against any tobacco product manufacturer that fails to place into escrow the funds required under Paragraph (2) of Subsection A of this section and Subsection B of this

section. Any tobacco product manufacturer that fails in any year to place into escrow the funds required under Paragraph (2) of Subsection A of this section and Subsection B of this section shall:

(1) be required within fifteen days to place such funds into escrow as shall bring it into compliance with Paragraph (2) of Subsection A of this section and Subsection B of this section. The court, upon a finding of a violation of Paragraph (2) of Subsection A of this section or Subsection B of this section, may impose a civil penalty to be paid to the state general fund in an amount not to exceed five percent of the amount improperly withheld from escrow per day of the violation and in a total amount not to exceed one hundred percent of the original amount improperly withheld from escrow;

(2) in the case of a knowing violation, be required within fifteen days to place such funds into escrow as shall bring it into compliance with Paragraph (2) of Subsection A of this section and Subsection B of this section. The court, upon a finding of a knowing violation of Paragraph (2) of Subsection A of this section or Subsection B of this section, may impose a civil penalty to be paid to the state general fund in an amount not to exceed fifteen percent of the amount improperly withheld from escrow per day of the violation and in a total amount not to exceed three hundred percent of the original amount improperly withheld from escrow; and

(3) in the case of a second knowing violation, be prohibited from selling cigarettes to consumers within the state (whether directly or through a distributor, retailer or similar intermediary) for a period not to exceed two years.

Each failure to make an annual deposit required under Paragraph (2) of Subsection A of this section shall constitute a separate violation.

History: Laws 1999, ch. 208, § 2; 2004, ch. 90, § 1.

Section 6-4-14 Short title

Sections 6-4-14 through 6-4-24 NMSA 1978 may be cited as the "Tobacco Escrow Fund Act".

History: Laws 2003, ch. 114, § 1; 2009, ch. 197, § 2.

Section 6-4-15 Findings and purpose

The legislature finds that violations of Section 6-4-13 NMSA 1978 threaten the integrity of the master settlement agreement and that enacting procedural requirements will safeguard the agreement and aid in its enforcement.

History: Laws 2003, ch. 114, § 2.

Section 6-4-16 Definitions

As used in the Tobacco Escrow Fund Act [6-4-14 NMSA 1978]:

A. "brand family" means all styles of cigarettes sold under the same trademark and differentiated from one another by means of additional modifiers such as "menthol", "lights", "kings" and "100s", and includes the use of a brand name, trademark, logo, symbol, motto, selling message, recognizable pattern of colors or other indicia similar to or identifiable with a previously known brand of cigarettes;

B. "cigarette" means "cigarette" as defined in Subsection D of Section 6-4-12 NMSA 1978;

C. "department" means the taxation and revenue department;

D. "directory" means a listing of tobacco product manufacturers and brand families that is developed, maintained and published by the attorney general;

E. "distributor" means a person required to affix stamps on cigarette packages pursuant to Section 7-12-5 NMSA 1978 or required to pay excise tax imposed on cigarettes pursuant to Section 7-12A-3 NMSA 1978. "Distributor" does not include a retailer of cigarette packages upon which stamps were already affixed when the packages were received by that retailer;

F. "master settlement agreement" means the settlement agreement and related documents entered into on November 23, 1998 by the state and leading United States tobacco product manufacturers;

G. "nonparticipating manufacturer" means a tobacco product manufacturer that is not a participating manufacturer;

H. "participating manufacturer" means a tobacco product manufacturer that is a "participating manufacturer" as defined in Section II(jj) of the master settlement agreement and subsequent amendments to that section;

I. "qualified escrow fund" means "qualified escrow fund" as defined in Subsection F of Section 6-4-12 NMSA 1978;

J. "secretary" means the secretary of taxation and revenue;

K. "tobacco product manufacturer" means "tobacco product manufacturer" as defined in Subsection I of Section 6-4-12 NMSA 1978; and

L. "units sold" means "units sold" as defined in Subsection J of Section 6-4-12 NMSA 1978.

History: Laws 2003, ch. 114, § 3.

Section 6-4-17 Certification by tobacco product manufacturer

A. No later than April 30 of each year, a tobacco product manufacturer whose cigarettes are sold in this state, whether directly or through a distributor, retailer or similar intermediary, shall execute and deliver to the attorney general, in the manner and on the form prescribed by the attorney general requesting such information as the attorney general deems reasonably necessary to make the determination required by Section 6-4-18 NMSA 1978, a certification pursuant to this section. The certification shall:

- (1) be made under penalty of perjury;
- (2) state that as of the date of the certification, the tobacco product manufacturer is either a participating or a nonparticipating manufacturer; and
- (3) include the information required pursuant to Subsection B or C of this section.

B. In its certification, a participating manufacturer shall include a complete list of its brand families.

C. In its certification, a nonparticipating manufacturer shall:

(1) certify that it is registered to do business in the state or has appointed an agent for service of process and has provided written notice to the attorney general in accordance with Section 6-4-20 NMSA 1978;

(2) certify that it is in full compliance with Section 6-4-13 NMSA 1978, the Tobacco Escrow Fund Act [6-4-14 NMSA 1978] and any rules promulgated pursuant to that act, including all annual payments as may be required by the attorney general;

(3) certify that it has established and maintains a qualified escrow fund governed by a qualified escrow agreement that has been reviewed and approved by the attorney general and provide:

(a) the name, address and telephone number of the financial institution where the fund is established;

(b) the account number of the fund and the subaccount number for the state;

(c) the amounts placed in the fund for cigarettes sold in the state during the preceding calendar year, including the date and amount of each deposit and any other evidence or verification of the amounts as the attorney general deems necessary; and

(d) the amount and date of each withdrawal or transfer of funds made at any time from the fund or from any other qualified escrow fund into which the nonparticipating manufacturer has made escrow payments pursuant to Section 6-4-13 NMSA 1978; and

(4) include a complete list of its brand families and:

(a) separately list the number of units sold in the state for each brand family during the preceding calendar year, indicating any brand family sold in the state during the preceding calendar year that is no longer being sold as of the date of certification; and

(b) indicate all of its brand families that have been sold in the state at any time during the current calendar year, identifying by name and address any other manufacturer of the brand families in the preceding or current calendar year.

D. In its certification, a nonparticipating manufacturer located outside of the United States shall also:

(1) certify that it has provided a declaration, on a form prescribed by the attorney general, from each of its importers into the United States of any of its brand families to be sold in New Mexico that the importer accepts joint and several liability with the nonparticipating manufacturer for all escrow deposits due in accordance with Section 6-4-13 NMSA 1978, for all penalties assessed in accordance with Section 6-4-13 NMSA 1978 and for payment of all costs and attorney fees imposed in accordance with the Tobacco Escrow Fund Act or Section 6-4-13 NMSA 1978; and

(2) certify that it has appointed a resident agent for service of process in New Mexico in accordance with Section 6-4-20 NMSA 1978.

E. A tobacco product manufacturer may not include a brand family in its certification unless:

(1) in the case of a participating manufacturer, the participating manufacturer affirms that the brand family is to be deemed its cigarettes for purposes of calculating its payments under the master settlement agreement for the relevant year in the volume and shares determined pursuant to the master settlement agreement; or

(2) in the case of a nonparticipating manufacturer, the nonparticipating manufacturer affirms that the brand family is to be deemed its cigarettes for purposes of Section 6-4-13 NMSA 1978.

F. A tobacco product manufacturer shall update the list of its brand families thirty days prior to any addition to or modification of its brand families by executing and delivering a supplemental certification to the attorney general.

G. A tobacco product manufacturer shall maintain all invoices and documentation of sales and other information relied upon for its certification to the attorney general for a period of five years, unless otherwise required by law to maintain them for a greater period of time.

H. Nothing in this section shall limit or otherwise affect the state's right to maintain that a brand family constitutes cigarettes of a different tobacco product manufacturer for purposes of calculating payments under the master settlement agreement or for purposes of Section 6-4-13 NMSA 1978.

History: Laws 2003, ch. 114, § 4; 2009, ch. 197, § 3.

Section 6-4-18 Directory of tobacco product manufacturers and cigarette brands

A. The attorney general shall develop, maintain and publish on its web site a directory listing all tobacco product manufacturers that have provided current, accurate and complete certifications as required by the Tobacco Escrow Fund Act [6-4-14 NMSA 1978] and all brand families that are listed in those certifications. The attorney general shall not include or retain in the directory a name or brand family if:

(1) the participating manufacturer fails to provide the required certification or to make a payment calculated by an independent auditor to be due from it under the master settlement agreement except to the extent that it is disputing such payment;

(2) the nonparticipating manufacturer fails to provide the required certification or the attorney general determines that its certification is not in compliance with Section 6-4-17 NMSA 1978; or

(3) the attorney general concludes that:

(a) all escrow payments required by Section 6-4-13 NMSA 1978 for any period for any brand family, whether or not listed by the nonparticipating manufacturer, have not been fully paid into a qualified escrow fund governed by a qualified escrow agreement that has been approved by the attorney general;

(b) any outstanding final judgments, including interest thereon, for violations of Section 6-4-13 NMSA 1978 have not been fully satisfied for the brand family or the nonparticipating manufacturer;

(c) for a nonparticipating manufacturer or a tobacco product manufacturer that became a participating manufacturer after the master settlement agreement in New Mexico or in any other state, or any of its principals, the nonparticipating manufacturer or tobacco product manufacturer fails to provide reasonable assurance that it will comply with the requirements of the Tobacco Escrow Fund Act; or

(d) the manufacturer has knowingly failed to disclose any material information required or knowingly made any material false statement in the certification of any supporting information or documentation provided.

B. As used in this section, "reasonable assurances" means information and documentation establishing to the satisfaction of the attorney general that a failure to pay in New Mexico or elsewhere was the result of a good faith dispute over the payment obligation.

C. The attorney general shall update the directory as necessary by adding or removing a tobacco product manufacturer or a brand family to keep the directory in conformity with the requirements of the Tobacco Escrow Fund Act.

D. A distributor shall provide a current electronic mail address to the attorney general for the purpose of receiving notifications as may be required pursuant to the Tobacco Escrow Fund Act.

History: Laws 2003, ch. 114, § 5; 2009, ch. 197, § 4.

Chapter 6. Public Finances

Article 4. State Funds and Capital Programs

N. M. S. A. 1978, § 6-4-18.1

§ 6-4-18.1. Bond requirements for newly qualified and elevated risk nonparticipating manufacturers

Effective: July 1, 2009

Currentness

A. The attorney general may require a nonparticipating manufacturer to post a bond for the first three years of the manufacturer's listing in the directory or for a longer period if the manufacturer has been determined to pose an elevated risk for noncompliance with the Tobacco Escrow Fund Act. The attorney general may consult with other states to determine the viability of a potential nonparticipating manufacturer and may impose additional requirements to protect state interests.

B. Notwithstanding any other provision of law, if a nonparticipating manufacturer is to be listed in the directory, and if the attorney general reasonably determines that a nonparticipating manufacturer that has filed a certification pursuant to Section 6-4-17 NMSA 1978 poses an elevated risk for noncompliance with the Tobacco Escrow Fund Act, the nonparticipating manufacturer and any of its brand families shall not be included in the directory until the nonparticipating manufacturer, or its United States importer that undertakes joint and several liability for the manufacturer's performance in accordance with Section 6-4-20 NMSA 1978, has posted bond in accordance with this section.

C. The bond shall be posted by a corporate surety located within the United States in an amount equal to the greater of fifty thousand dollars (\$50,000) or the amount of escrow the manufacturer, in either its current or predecessor form, was required to deposit as a result of its previous calendar year sales in New Mexico. The bond shall be written in favor of the state of New Mexico and shall be conditioned on the performance by the nonparticipating manufacturer or its United States importer that undertakes joint and several liability for the manufacturer's performance in accordance with all of its obligations under the Tobacco Escrow Fund Act or Section 6-4-13 NMSA 1978 during the year in which the certification is filed and the next succeeding calendar year.

D. A nonparticipating manufacturer may be deemed to pose an elevated risk for noncompliance with this section or Section 6-4-13 NMSA 1978 if:

(1) the nonparticipating manufacturer or any of its affiliates has underpaid an escrow obligation within the past three calendar years, unless:

(a) the manufacturer did not make underpayment knowingly or recklessly and the manufacturer promptly cured the underpayment within one hundred eighty days of notice; or

(b) the underpayment or lack of payment is the subject of a good faith dispute as documented to the satisfaction of the attorney general and the underpayment is cured within one hundred eighty days of entry of a final order establishing the amount of the required escrow payment;

(2) any state has removed the manufacturer or its brands or brand families or an affiliate or any of the affiliate's brands or brand families from the state's tobacco directory for noncompliance with the state law at any time within the past three calendar years; or

(3) any state has litigation pending against, or an unsatisfied judgment against, the manufacturer or any of its affiliates for escrow or for penalties, costs or attorney fees related to noncompliance with the state escrow laws.

E. As used in this section, "newly qualified nonparticipating manufacturer" means a nonparticipating manufacturer that has not previously been listed in the directory.

Credits

Added by L. 2009, Ch. 197, § 5, eff. July 1, 2009.

NMSA 1978, § 6-4-18.1, NM ST § 6-4-18.1

Current through Ch. 228 (end) of the First Regular Session of the 51st Legislature (2013)

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Section 6-4-19 Maintenance of directory; notice

A. If the attorney general determines to remove from or to not include a tobacco product manufacturer or brand family in the directory, the attorney general shall provide by email or other practicable means notice of the preliminary determination to the tobacco product manufacturer's registered agent for service of process in the state; provided, however, that if one of the bases of removal or non-inclusion in the directory is the failure to satisfy Section 7 [6-4-20 NMSA 1978] of the Tobacco Escrow Fund Act, the determination shall be final and no preliminary notice shall be necessary. The tobacco product manufacturer shall have ten business days from the date of the attorney general's notice of the preliminary determination to the registered agent for service of process in the state to establish, to the attorney general's satisfaction, compliance with Section 6-4-13 NMSA 1978 and the Tobacco Escrow Fund Act.

B. If the tobacco product manufacturer fails to establish said compliance within the ten-day period set forth above, the attorney general shall remove from or not include the tobacco product manufacturer or brand family in the directory. The determination to remove from or to not include a tobacco product manufacturer or brand family in the directory may be appealed to the district court pursuant to the provisions of Section 39-3-1.1 NMSA 1978.

History: Laws 2003, ch. 114, § 6.

Section 6-4-20 Agent for service of process

A. A nonparticipating manufacturer not registered to do business in the state shall, as a condition precedent to having its name or its brand families listed and retained in the directory, appoint and continually engage without interruption a registered agent in this state for service of process on whom all process and any action or proceeding arising out of the enforcement of the Tobacco Escrow Fund Act [6-4-14 NMSA 1978] or Section 6-4-13 NMSA 1978 may be served. The nonparticipating manufacturer shall provide to the attorney general the name, address and telephone number of its agent for service of process and shall provide any other information relating to its agent as may be requested by the attorney general.

B. A nonparticipating manufacturer located outside of the United States shall, as an additional condition precedent to having its brand families listed or retained in the directory, cause each of its importers of any of its brand families to be sold in New Mexico to appoint, and continually engage without interruption, the services of an agent in the state in accordance with the provisions of this section. All obligations of a nonparticipating manufacturer imposed by this section with respect to appointment of its agent shall also apply to the importers with respect to appointment of their agents.

C. A nonparticipating manufacturer shall provide written notice to the attorney general thirty calendar days prior to the termination of the authority of an agent appointed pursuant to Subsections A and B of this section. No less than five calendar days prior to the termination of an existing agent appointment, a nonparticipating manufacturer shall provide to the attorney general the name, address and telephone number of its newly appointed agent for service of process and shall provide any other information relating to the new appointment as may be requested by the attorney general. In the event an agent terminates an agency appointment, the nonparticipating manufacturer shall notify the attorney general of the termination within five calendar days and shall include proof to the satisfaction of the attorney general of the appointment of a new agent.

D. A nonparticipating manufacturer whose products are sold in this state without appointing or designating an agent as required by this section shall be deemed to have appointed the secretary of state as agent and may be proceeded against in the courts of this state by service of process upon the secretary of state; provided that the appointment of the secretary of state as agent shall not satisfy any other requirement of the Tobacco Escrow Fund Act.

History: Laws 2003, ch. 114, § 7; 2009, ch. 197, § 6.

Section 6-4-20.1 Joint and several liability

For each nonparticipating manufacturer located outside the United States, each importer into the United States of the nonparticipating manufacturer's brand families that are sold in New Mexico shall bear joint and several liability with the nonparticipating manufacturer for deposit of all escrow amounts due under Section 6-4-13 NMSA 1978, payment of all penalties imposed in accordance with Section 6-4-13 NMSA 1978 and payment of all costs and attorney fees imposed in accordance with the Tobacco Escrow Fund Act [6-4-14 NMSA 1978].

History: 1978 Comp., § 6-4-20.1, as enacted by Laws 2009, ch. 197, § 7.

Section 6-4-21 Reporting of information; escrow installments

A. A distributor shall submit to the department by the twenty-fifth day of each month a list by brand family of the total number of cigarettes, or equivalent stick count in the case of roll-your-own, for which the distributor affixed tax stamps or otherwise paid the tax due during the previous calendar month, and any other information that the department or attorney general may require. A distributor shall maintain and make available to the department and attorney general all invoices and documentation of sales of all nonparticipating manufacturer cigarettes and any other information relied upon in reporting to the department and attorney general for a period of five years.

B. The department and attorney general shall share information received pursuant to the Tobacco Escrow Fund Act [6-4-14 NMSA 1978], and may share information with other federal, state or local agencies for purposes of enforcement of that act, enforcement of Section 6-4-13 NMSA 1978 or enforcement of corresponding laws of other states.

C. The attorney general may require proof from a nonparticipating manufacturer that it has established a qualified escrow fund with verification of the amount of money in the fund exclusive of interest, including the balance, dates and amounts of deposits and dates and amounts of withdrawals.

D. The attorney general and the department may require a distributor or tobacco product manufacturer to submit additional information as necessary to determine compliance with the Tobacco Escrow Fund Act, including samples of the packaging or labeling of each brand family.

E. The attorney general may require a nonparticipating manufacturer to make escrow fund deposits quarterly and may require information sufficient to determine the adequacy of the amount of the quarterly deposit.

F. The attorney general or the department may seek an injunction to compel compliance with this section. In any action brought pursuant to this subsection, the state shall be entitled to recover the costs of investigation, costs of the action and reasonable attorney fees.

History: Laws 2003, ch. 114, § 8; 2004, ch. 103, § 1.

Section 6-4-22 Penalties and other remedies

A. It is unlawful for a person to:

- (1) affix a tax stamp or otherwise pay the tax due on a package or other container of cigarettes of a tobacco product manufacturer or a brand family that is not included in the directory; or
- (2) sell, offer for sale or possess for any purpose other than personal use cigarettes of a tobacco product manufacturer or a brand family that is not included in the directory.

B. The secretary may revoke or suspend the registration or license of a person licensed or registered pursuant to Section 7-12-9.1 or 7-12A-7 NMSA 1978 that violates Subsection A of this section.

C. Each stamp affixed, payment of tobacco tax, offer to sell, possession for any purpose other than personal use or sale of cigarettes in violation of Subsection A of this section constitutes a separate violation. For each violation, the secretary may impose a civil penalty in an amount not to exceed the greater of five thousand dollars (\$5,000) or five hundred percent of the retail value of the cigarettes sold, offered for sale or possessed for any purpose other than personal use.

D. Cigarettes that have been sold, offered for sale or possessed for any purpose other than personal use in this state in violation of Subsection A of this section are contraband, are subject to seizure and forfeiture and shall be destroyed.

E. It is unlawful for a person to sell, distribute, acquire, hold, own, possess, transport, import or cause to be imported cigarettes that the person knows or should know are intended for distribution or sale in violation of Subsection A of this section. A person who violates this subsection is guilty of a misdemeanor and shall be sentenced in accordance with Section 31-19-1 NMSA 1978.

F. A tobacco product manufacturer, stamping agent or importer of cigarettes, or any officer, employee or agent of any such entity, who knowingly makes any materially false statement in any record required by the Tobacco Escrow Fund Act [6-4-14 NMSA 1978] or Section 6-4-13 NMSA 1978 to be filed with the attorney general is guilty of a fourth degree felony and upon conviction shall be sentenced pursuant to the provisions of Section 31-18-15 NMSA 1978.

G. The attorney general or the department may seek an injunction to compel compliance with or to restrain a threatened or actual violation of Subsection A of this section. In any action brought pursuant to this subsection, the state shall be entitled to recover the costs of investigation, costs of the action and reasonable attorney fees, if the state prevails.

H. The attorney general may issue a civil investigative demand based on reasonable belief that any person may be in possession, custody or control of an original or copy of any book, record, report, memorandum, paper, communication, tabulation, map, chart, photograph, mechanical transcription or other document or recording relevant to the subject matter of an investigation of a probable violation of the Tobacco Escrow Fund Act. The attorney general may, prior to the institution of a civil proceeding, execute in writing and cause to be served upon the person a civil investigative demand requiring the person to produce documentary material and permit the inspection and copying of the material.

I. For the purposes of this section, fewer than one thousand cigarettes shall be presumed to be for personal use.

History: Laws 2003, ch. 114, § 9; 2009, ch. 197, § 8.

Section 6-4-23 General provisions

A. The attorney general and the secretary shall promulgate rules to effectuate the purposes of the Tobacco Escrow Fund Act [6-4-14 NMSA 1978].

B. In an action brought by the state to enforce the provisions of the Tobacco Escrow Fund Act, the state shall be entitled to recover the costs of investigation, costs of the action and reasonable attorney fees, if the state prevails.

C. If a court determines that a person has violated a provision of the Tobacco Escrow Fund Act, the court shall order any profits, gain, gross receipts or other benefit from the violation to be disgorged and paid to the state treasurer for deposit in the general fund.

D. The remedies and penalties provided in the Tobacco Escrow Fund Act are cumulative to each other and to penalties and remedies available under other laws.

History: Laws 2003, ch. 114, § 10.

Section 6-4-24 Construction of act

If a court finds that a provision of the Tobacco Escrow Fund Act [6-4-14 NMSA 1978] and of Sections 6-4-12 and 6-4-13 NMSA 1978 conflict and cannot be harmonized, Sections 6-4-12 and 6-4-13 NMSA 1978 shall control. If a provision of the Tobacco Escrow Fund Act causes Sections 6-4-12 and 6-4-13 NMSA 1978 to no longer constitute a qualifying or model statute as those terms are defined in the master settlement agreement, that provision shall be invalid.

History: Laws 2003, ch. 114, § 11.

Section 6-4-24.1 Attorney general authority; audit and investigation

The attorney general or the attorney general's authorized representative may conduct audits and investigations of:

- A. a nonparticipating tobacco product manufacturer and its importers;
- B. a tobacco product manufacturer as defined in Section 6-4-12 NMSA 1978 that became a participating manufacturer after the master settlement agreement execution date, as defined at section II(aa) of the master settlement agreement, and its importers;
- C. exclusive distributors, retail dealers, stamping agents and wholesale dealers; and
- D. persons or entities engaged in delivery sales.

History: 1978 Comp., § 6-4-24.1, as enacted by Laws 2009, ch. 197, § 9.

Section 6-4-24.2 Presumption

In any action under Section 6-4-13 NMSA 1978, reports of numbers of cigarettes stamped submitted pursuant to Subsection A of Section 6-4-21 NMSA 1978 shall be admissible evidence and shall be presumed to state accurately the number of cigarettes stamped during the time period by the stamping agent that submitted the report, absent a contrary showing by the nonparticipating manufacturer or importer. Nothing in this section shall be construed as limiting or otherwise affecting the state's right to maintain that such reports are incorrect or do not accurately reflect a nonparticipating manufacturer's sales in the state during the time period in question, and the presumption shall not apply in the event that the state does so maintain.

History: 1978 Comp., § 6-4-24.2, as enacted by Laws 2009, ch. 197, § 10.